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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PAUL NEAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Appeal From The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 26 U.S.C. Section 7203 including congressional amendments contained in 26 U.S.C. Section 4424 violate the Fifth Amendment right against self-incrimination and due process when weighed against the prohibition contained in 21 O.S. Section 982 which prohibits recordation of the type information required by the Internal Revenue Code.

2. Can willful intent be proven beyond a reasonable doubt when knowledge of a legal duty is not shown and self-incrimination ignored.

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PETITION FOR A WRIT OF CERTIORARI

Paul E. Neal, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-7a) is reported at ___ F. 2d, ___. The opinion of the district court is not reported.

JURISDICTION

The judgment of the Court of Appeals (App. A, infra) was entered in September 3, 1987, a petition for rehearing and suggestion for rehearing in banc was denied on March 25, 1988, (App. B, infra, 8-a). The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

Tit. 21 O.S. § 982, states in pertinent part and defines commercial gambling as:

1. Operating or receiving all or part of the earnings of a gambling place;
2. Receiving, recording, or forwarding bets or offers to bet; possessing facilities to do so;
3. For gain, becoming a custodian of anything of value bet; or offered to bet;
4. Alone or with others, owning, controlling, managing, or financing a gambling business;
5. Any person found guilty of commercial gambling shall be punished by imprisonment for not more than ten (10) years, or a fine of not more than Twenty-five Thousand Dollars ($25,000.00), or by both such fine and imprisonment.

Tit. 21 O.S. § 981(4) defines in pertinent part a gambling place as follows:

> A "gambling place" is any place, room, building, vehicle, tent, or location which is used for any of the

following: making and settling bets; receiving, holding, recording, or forwarding bets or offers to bet; conducting lotteries; or playing gambling devices. Evidence that the place has a general reputation as a gambling place or that, at or about the time in question, it was frequently visited by persons known to be commercial gamblers or known as frequenters of gambling places is admissible on the issue of whether it is a gambling place.

Tit. 26 U.S.C. § 4411, states in pertinent part:

Imposition of tax

"There shall be imposed a special tax of $500 per year to be paid by each person who is liable for tax under Section 4401, or who is engaged in receiving wagers or on behalf of any person so liable."

Tit. 26 U.S.C. Section 4412 provides in pertinent part:

(a) Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence,

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place residence of each person who is engaged in receiving wages for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of such person. * * *

Tit. 26 U.S.C. § 7203, states in pertinent part:

Willful failure to file return, supply information, or pay tax "Any person required under this title to pay any estimated tax or tax, or required by this title or

by regulations made under authority thereof to make a return (other than a return required under Section 6015), keep any records or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosection."

Tit. 26 U.S.C. § 4424 states in pertinent part:

(a)—Except as otherwise provided in this section, neither the Secretary or his delegate nor any other employee of the Treasury Department may divulge or make known in any manner whatever to any person—

(1) Any original, copy or abstract of any return, payment, or registration made pursuant to this chapter,

(2) Any record required for making any such return, payment, or registration, which the Secretary or his delegate is permitted by the taxpayer to examine or which is produced pursuant to Section 7602, or

(3) Any information come at by the exploitation of any such return, payment, registration or record.

(b)—A disclosure otherwise prohibited by subsection

(a) may be made in connection with the administration or civil or criminal enforcement of any tax imposed by this title. However, any document or information so disclosed may not be

(1) divulged or made known in any manner whatever by any officer or employee of the United States to any person except in connection with the

administration or civil or criminal enforcement of this title, * * *

(c) * * * Except in connection with the administration or civil or criminal enforcement of any tax imposed by this title—

(1) Any stamp denoting payment of the special tax under this chapter,

(2) Any original, copy or abstract possessed by a taxpayer of any return, payment, or registration made by such taxpayer pursuant to this chapter, and

(3) Any information come at by the exploitation of any such document, shall not be used against such taxpayer in any criminal proceeding.

STATEMENT OF THE CASE

Petitioner was charged in a four count information with failure to pay gambling franchise tax while accepting wagers on sporting events in the Western District of Oklahoma during the period covering calendar years, 1978, 1979, 1980, and 1981. Petitioner was convicted on all four counts with Judgment and Sentence entered by the Honorable Ronald E. Howland, United States Magistrate for the Western District of Oklahoma, on June 26, 1984. Petitioner was sentenced to one year incarceration in a federal correctional facility on each count and fined Five Thousand Dollars ($5,000.00) on each count plus costs of prosecution. Subsequently, an appeal was taken to the United States District Court for the Western District of Oklahoma, before the Honorable Lee R. West, United States District Judge. By opinion an order, dated April 21, 1986 the court affirmed Petitioner's conviction.

Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. In an opinion, dated Sep-

tember 3, 1987, the court affirmed Petitioner's conviction. (App. A, infra, 1a-7a).

On March 25, 1988 the United States Court of Appeals for the Tenth Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing in Banc. (App. B, infra, 8a)

STATEMENT OF FACTS

Petitioner's conviction of the alleged willful failure to pay gambling franchise tax was the end result of an investigation by the United States Attorney General's Strike Force on Crime instituted in late 1978. As a result of the Strike Force investigation nine co-defendants were charged with conspiracy to violate federal gambling statutes, no information or complaint was ever filed by the Internal Revenue Service.

Petitioner submits that his assertion of Fifth Amendment Right against self-incrimination is a complete defense to the willful requirement in failing to purchase the gambling tax stamp and file form 11-C and 730, (App. C, infra 10a-12a) as required by the Internal Revenue Code. 26 U.S.C. Section 7203.

REASONS FOR GRANTING THE PETITION

This case, raises important constitutional, as well as procedural due process questions.

The United States Court of Appeals for the Tenth Circuit failed to address the issue raised by Petitioner of Fifth Amendment grounds of due process an right against self-incrimination.

The evidence presented by the prosecution at trial failed to prove beyond a reasonable doubt that Petitioner willfully failed to pay the occupational tax required by 26

U.S.C. Section 7203 or to purchase the occupational wagering tax stamp as required by 26 U.S.C. Section 4411.

I. WHILE THE FEDERAL GOVERNMENT REQUIRES UNDER 26 U.S.C. SECTION 4403 TO KEEP DAILY WAGERING RECORDS, STATE LAW TITLE 21 O.S. SECTION 982, ET SEQ. FORBIDS RECORDING A WAGER.

Petitioner would show the Honorable Court that: to require record keeping imposed by 26 U.S.C. Section 4403 as it relates to 26 U.S.C. Section 4411 and Section 7203 is in direct conflict with the prohibition of recording wagers under Title 21 O.S. (1981) Sec. 981 and 982.

Failure to keep such daily wagering records makes it impossible for those liable for the payment of occupational tax to pay the taxes imposed by 26 U.S.C. Section 7203. In fact, a tax payment unaccompanied by form 11-C and 730 (App. C, infra) is not accepted by the Internal Revenue.

The Language adopted by Congress in the 1974 Amendment to 26 U.S.C. Section 4424 concerning disclosure of wagering information does not address the real hazards of the self-incriminating type of records that must be kept by those engaged in accepting wagers.

While 26 U.S.C. Section 4424 prohibits disclosure by Treasury Department employees of information contained on Form 11-C and 730 there still remains the hazard of keeping such records at the place of business requirement of 26 U.S.C. Section 4412 which requires anyone liable for special tax under 26 U.S.C. Section 4411 to register the place of business. Title 21 O.S. (1981) Sec. 982 expressly forbids maintaining a "gambling place". The government cannot require under penalty of law the

conformity of a citizen to standards that would incriminate him under state laws.

Petitioner asserts that the language used in 26 U.S.C. Section 4424 constitutes a waiver of his fifth amendment right against self-incrimination. To give credence to such a waiver without further examination of the circumstances in which it places him and others, is an erosion of the privilege through ingeniously drafted legislation that in reality cannot provide the protection as stated.

While it is not unconstitutional to tax illegal activities such as wagering it is unconstitutional to convict one for failure to keep records in direct conflict with the state laws of that persons residence. Oklahoma's Comprehensive Gambling law strictly prohibits keeping a "gambling place", receiving or recording a wager.

Requiring the registration of the place of business along with the requirement to keep wagering records at that place of business would require that one be a "sitting duck" for state enforcement and prosecution under the gambling statutes of the state, i.e. 21 O.S. (1981) Sec. 981 and 982.

Petitioner again would stress that the record keeping conflicts hereinabove stated create a real and appreciable, and not merely an imaginary and unsubstantial, hazard of self-incrimination and violation of due process rights as guaranteed by the Constitution. *Marchetti* v. *United States*, 390 U.S. 39, 88 S.Ct. 691, 19 L.Ed.2d 889 (1968) *Grosso* v. *United States*, 990 U.S. 62, 98 S.Ct. 709, 19 L. Ed. 2d 906 (1968).

II. THE GOVERNMENT CANNOT SHOW WILLFUL FAILURE TO PROVIDE TAX INFORMATION AS REQUIRED BY 26 U.S.C. SECTION 7203.

Petitioner would show this Honorable Court that his failure to provide tax information was by no means willful.

Petitioner sought and solicited the advice of an attorney with respect to Internal Revenue Service form 11-C and 730 (which he received by mail without any explanation) and under Title 26, U.S.C., Section 7203. Petitioner sought legal advice, as a result, of the receipt of form 11-C and 730 (App C, infra)

Never at any time did the Internal Revenue Service communicate with Petitioner, though the government was in possession of certain information and confiscated materials since early 1979, which caused the Internal Revenue Service to believe Petitioner was engaged in gambling activities and prompting them to forward form 11-C and 730 to Petitioner. Why did the government fail to inform Petitioner of his legal duty to purchase the gambling tax stamp and the tax requirements associated with the business of gambling? Proof of known legal duty is necessary to prove that Petitioner acted willfully. The government offered newspaper articles that had appeared, from time to time, in a local newspaper. In *United States* v. *McGonigal*, 214 F. Supp. 621 (D.C. Del. 1963) Defendant was convicted of willfully failing to purchase a gambling tax stamp. The court in *McGonigal*, supa entered a judgment acquittal on sufficiency of evidence grounds, because the government's evidence failed to justify inference that Defendant willfully failed to purchase the gambling tax stamp. There was, in McGonigal, no direct evidence that Defendant, who was shown to be a "bookie" knew that the gambling stamp was required. Only circumstantial evidence of knowledge was shown by the government was showing that local newspapers had carried an average of six articles a year for the previous five years which stated that those in the business of accepting wagers had to purchase a tax stamp. Again in *Edwards* v. *United States*, 321 F. 2d 324 (C.A. Fla. 1963)

the court held that proof that defendants were aware of federal tax on persons engaged in the business of accepting wagers and willfully refused to pay it was indispensable in prosecution for willful failure to pay tax and, absent such proof, convictions were required to be reversed and information dismissed. When the government itself ignores its legal duty to inform taxpayers of their legal duty, newspaper articles cannot act as a substitute for actual notice.

The question of "willful" as used in Title 26, U.S.C., Section 7203 of the Internal Revenue Code was addressed by this court, in the case of *United States* v. *Bishop*, 412 U.S. 346, 93 S.Ct. 2608, 36 L. Ed. 2d 941 (1973). The court observed:

> "The Court's consistent interpretation of the word "willfully" is to require an element of mens rea, implements the pervasive intent of congress to construct penalties that separate the purposeful tax violator from well-meaning, but easily confused mass of taxpayers."

The common definition of willful is: The exercise of one's own will; voluntary and intentional. Petitioner's actions were not voluntary, intentional, nor an exercise of his own will. Petitioner's failure to provide the information demanded on Internal Revenue Service form 11-C was due to his confusion by the unexplained receipt of form 11-C. Advice of an attorney (App. D. & E., infra 13a-14a) who is considered a "specialist" in gambling law, advised Petitioner to withhold the information requested due to the Oklahoma state law concerning gambling. Actions which are the result of faith in the advice of an attorney and an exercise of his right against self-incrimination, does not equal willful.

In order for a criminal act to be willful, it must not only be committed deliberately and knowingly, but with bad motive, or evil intent. *United States* v. *Palermo*, 259 F. 2d 872 (3rd Cir. 1958). Simply stated, in order for the government to convict, it must proved beyond a reasonable doubt that this Petitioner committed one or more of the specified violation with intention of "getting away with it". *United States* v. *Roy*, 213 F. Supp. 479 (D.Del. 1963).

Petitioner was advised attorney and in fear that providing the required information, would violate his Fifth Amendment privilege against self-incrimination by showing an intent to violate Oklahoma state law which would subject him to prosection under Oklahoma Statute 21, (1981) Sec. 981, 982, et seq., a felony statue which provides for a prison term of ten years and a fine of Twenty-five Thousand Dollars ($25,000.00) and defines in pertinent part, commercial gambling as follows:

1. Operating or receiving all or part of the earnings of a gambling place;

2. Receiving, recording or forwarding bets or offers to bet; possessing facilities to do so;

3. For gain, becoming a custodian of anything of value bet or offered to bet;

4. Alone or with others, owing, controlling, managing or financing a gambling business.

The information the government demands be kept in order to provide information on Internal Revenue Service form 11-C and 730, would without doubt, be the exact same information forbidden by Oklahoma Statute 21, (1981) Sec. 981 and 982. While amendments to 26 U.S.C. Section 4424 was passed by Congress to *help* overcome the use of tax records *to be used as evidence* against a defendant in state prosecution of a crime, complete *con-*

fidentiality cannot be guaranteed. All law enforcement agencies, both federal and state, use information provided by informants. While 26 U.S.C. Section 4424 prohibits those employed by the Treasury Department from making known information, to state law enforcement agencies, other federal employees are not prohibited. The instant case was not the end result of Internal Revenue Service investigation or complaint. This tax case was the end result of a Strike Force on Crime investigation and raids conducted by the Federal Bureau of Investigation gambling activities in an effort to charge Petitioner and nine other defendants on conspiracy. When the conspiracy indictment was dismissed, Petitioner was charged, indicted and tried for failure to purchase the gambling tax stamp and failure to pay occupational tax. Under statute, Internal Revenue Service may not disclose information on wagering tax returns to other law enforcement agencies. In this case information was disclosed to the Justice Department when the case was not brought by the Internal Revenue Service.

Employees of the Justice Department were privileged to information from the Treasury Department. Once Justice Department employees have this knowledge, they are not prohibited from disclosing such knowledge to state law enforcement agencies which would give state law enforcement agents probable cause to make an independent investigation to determine if a violation of state statute was being committed. The record keeping required by the government, names and amounts wagered, etc., would allow state law enforcement agencies, following a raid, to contact those placing wagers and subpeona them for testimony, thus not violating the provisions of U.S.C. Section 4424. Simply stated, failure of the government to supply state law enforcement agencies

with tax information does not mean such information will not be "leaked" by any source. The U.S. District Attorney for the Western District of Oklahoma, has in the past and recently, been actively participating with state legislators, crime bureau officials and others concerning crime legislation and enforcement on the state level. (App. F, G, H, infra 16a-18a) When government officials assume this posture of complete, active, participation and cooperation with state officials, Petitioner has a genuine basis to feel that information in connection with the gambling tax stamp and occupational wagering tax would be self-incriminating in connection with state statutes.

Petitioner asserts his Fifth Amendment privilege against self-incrimination. *Grosso* v. *United States*, *Marchetti* v. *United States*, supra. Petitioner submits that the hazards of such government compelled reporting are now as they were prior to the post-Marchetti statutory wagering tax scheme, that the hazards of state prosecution based on the danger that information can be obtained through government officials, other than those employed by the Treasury Department, present a real and appreciable hazard, and not merely imaginary and unsubstantial hazards of self-incrimination. *Marchetti* v. *United States*, supra. Even National Security has been breached by such "leaks". No law can guarantee such confidentiality, even though the intent of Congress was to insure such confidentiality.

Congress or any designated government official cannot pass a law, which gives a citizen of a state, immunity from prosection for violation of a state statute. The mere recitation of language like that contained in 26, U.S.C., Section 4424 cannot guarantee that a person, engaged in gambling activities and conforming to the requirements of record keeping, will not have such required information

used against them by state authorities. Preclusion from using the tax information itself as evidence in state prosecutions does not address the issue of testimonial evidence concerning the information that is required to be kept for use on Internal Revenue Service form 11-C and 730.

Simply stated, Congress cannot conspire with a citizen of a state to keep "secret' the violation of state law and promise governmental protection. Congress cannot pass any law which pre-empts a sovereign state from its Constitutionally guaranteed right to enforce its laws. While congress may tax, the requirement of information cannot be demanded without pre-empting state law.

Since 26, U.S.C., Section 4424, promises to "keep secret" any information concerning the purchase of a gambling tax stamp and payment of taxes on money earned from wagering, why then was information given to Justice Department employees when this was not an Internal Revenue case?

Petitioner's confusion about the tax information requested on form 11-C and 730, without explanation, from the Internal Revenue Service, ran so deep that he sought professional, legal advice, which he followed. Therefore, the government's burden of proof of the mens rea element of willful, failed to show any criminal intent on Petitioner's part. It is apparent that Petitioner was not a "purposeful tax violator", but was one of "the well-meaning but easily confused mass of taxpayers". *Bishop* supra.

> "Due process commands that no man shall lose his liberty unless the government has borne the burden of convincing the fact finder of his guilt beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 368 (1970).

CONCLUSION

For the reasons set forth herein, this Court should note jurisdiction of this appeal so that the Constitutional question raised can be given consideration.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 86-1676
(W.D.Okla. CR-84-117-W)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PAUL E. NEAL,
Defendant-Appellant.

ORDER AND JUDGMENT

Before HOLLOWAY, Chief Judge, and MOORE, and TACHA, Circuit Judges

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FILED SEP 3 1987

Defendant was convicted by a jury before a magistrate on four counts of violating 26 U.S.C. § 7203, failure to pay, from September 1978 through June 30, 1982, the $500 yearly occupational stamp tax which 26 U.S.C. § 4411 imposes on persons receiving wagers. The magistrate sentenced him to one year of imprisonment for each of the four counts on which he was convicted, the terms on Counts II, III and IV to be served concurrently with the term on Count I. The magistrate also fined defendant $5,000 on each count, for a total of $20,000, plus

costs of prosecution of $3,251.59.[1] I R. Tab 5-4-84, Tab 6-26-84. Defendant appealed to the District Court, making the same arguments he urges here. The District Court affirmed his convictions. This timely appeal followed. We affirm.

I.

Defendant does not challenge the instructions the magistrate gave the jury on the elements the Government must prove to obtain a conviction under 26 U.S.C. § 7203:

> (1) That the defendant was engaged in the business of accepting wagers which required him to pay the occupational tax imposed for the years in question;
>
> (2) That the defendant failed to pay the tax; and
>
> (3) That the defendant's failure to pay was willful.

V R. 610. *Accord* 2 Devitt & Blackmar, *Federal Jury Practice and Instructions* § 35.29 at 148 (1977); *Haskell* v. *United States*, 241 F.2d 790, 794 (10th Cir.), *cert. denied*, 354 U.S. 921 (1957) (elements of § 7203 misdemeanor of failure to file return).

Defendant argues that under § 7203 willfulness requires "a voluntary, intentional violation of a known legal duty." *United States* v. *Rothbart*, 723 F.2d 752, 754 (10th Cir. 1983), *quoting United States* v. *Pomponio*, 429 U.S. 10, 12 (per curiam); *see also United States* v. *Bishop*, 412 U.S. 346, 360 (1973). Defendant's claim is that the evidence fails to show such willfulness and also fails to prove that he did not pay the tax.

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[1] In relevant part, 26 U.S.C. § 7203 provides:

> Any person required under this title to pay any . . . tax . . . who willfully fails to pay such . . . tax . . . at the time or times required by law . . . shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. § 4411 imposes "a special tax of $500 per year to be paid by" wagerers liable for the two percent gross receipts tax imposed by 26 U.S.C. § 4401 and anyone "engaged in receiving wagers for or on behalf of any person so liable." 26 U.S.C. § 4411.

II.

The issue is whether the evidence, direct and circumstantial, viewed in the light most favorable to the conviction and together with all reasonable inferences, is substantial enough to establish defendant's guilt beyond a reasonable doubt. *United States* v. *Blandin*, 784 F.2d 1048, 1050 (10th Cir. 1986); *see also United States* v. *Kaatz*, 705 F.2d 1237, 1245 (10th Cir. 1983) ("The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it") (*quoting Glasser* v. *United States*, 315 U.S. 60, 80, (1942)).

The evidence from several witnesses established that Defendant Neal was engaged in the business of accepting wagers during the periods alleged in the information and therefore was required to pay the stamp tax.[2] Defendant claims, however, that his conviction must be overturned because the evidence is (1) insufficient to support an inference that any failure by him to pay the tax was willful, and (2) insufficient to support the inference that, in fact, he failed to pay the tax.

A. Evidence Of Willfulness

A prime contention made at trial and now on appeal is that the Government failed to prove the element of willfulness beyond a reasonable doubt because the evidence does not establish that defendant knew he had a legal duty to pay the tax imposed by § 4411 or that he voluntarily or intentionally did not pay that tax during the times alleged in the information. Appellant's Brief at 5-6. We are not persuaded by the argument.

"Willfulness may be inferred from 'concealment of assets or covering up sources of information, handling of one's affairs to

---

[2] For example, Tracy Coy Poe, a bookmaker in Oklahoma City who was getting out of the business, began in the latter part of 1978 to give Neal some of his "little players," bettors who generally wagered $25 to $500 per game on football, basketball and baseball. IV R. 361-62.

avoid making the records usual in transactions of the kind, and any conduct the likely effect of which would be to mislead or conceal.'" *United States* v. *Kaatz*, 705 F.2d at 1246, *quoting Spies* v. *United States*, 317 U.S. 492, 499 (1943). The Government introduced evidence that Neal used the fictitious name "Fred" throughout the periods alleged, IV R. 329, 362, that he had a location outside his home for a bank of phones and betting pads for his bookmaking activities, that he gave no receipts and operated on a cash basis, that he used code numbers to identify bettors, and that he kept his records in code. IV R. 438-444. The evidence as a whole supports an inference that defendant knew about the stamp tax and conducted his business the way he did to hide his activities from the IRS and avoid paying the tax. *See United States* v. *Gallo*, 659 F.2d 110, 115 (9th Cir. 1981); *United States* v. *Kaatz*, 705 F.2d at 1246.

Moreover there was evidence of willfulness in the testimony of Mr. Cardarella, a Kansas City attorney who had previously represented Poe, a major bookmaker in Oklahoma City and one of defendant's associates. The defense called Mr. Cardarella as its only witness. He testified that defendant came to Kansas City to see him in "the first month or two of 1981" to discuss "[t]he question of whether there was a conflict between the requirement to file certain federal . . . gambling tax forms, and the Fifth Amendment . . . ." V R. 489-490. Cardarella said that he told defendant it was his opinion that the obligation to provide certain information on gambling tax forms "was in conflict with" the self incrimination clause of the Fifth Amendment and "that for that reason [defendant] could not lawfully be compelled to provide this information." V R. 491. He said defendant "had received some forms from the Federal Government and felt that there was a problem in returning those forms because of the information they required." V R. 502. He said defendant showed him a Form 730. V R. 503-04, 525-26.

The jury could infer from Mr. Cardarella's testimony and the other proof that defendant knew about the requirement to pay gambling stamp taxes and that his failure to do so was intentional. Defendant argues that Cardarella's testimony estab-

lishes only that he "made inquiry and sought the advice of an attorney in order to determine what the law required of him." Appellant's Brief at 5. However, Cardarella never testified that he advised defendant not to file the Form 11-C or pay the $500 tax, but only that he told defendant the requirement to provide certain *information* on gambling tax forms conflicted with the Fifth Amendment.[3]

B. Evidence Of Failure To Pay

Defendant also argues strenuously on appeal that the Government's evidence of his failure to pay the gambling tax is insufficient to prove that element of the crime beyond a reasonable doubt. In particular, defendant Neal stresses the failure of the Government in its computer search for a record of his payment of the tax to use his social security number, and the use in the computer search of an address which was not his correct residence address.

Stuart Bradford, custodian of records from the Internal Revenue Service Center in Austin, Texas, testified that he "was requested to see if there was any record of Forms 11-C filed by a Paul Neal." IV R. 408-09. IRS Form 11-C is the Special Tax Return and Application for Registry which an

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[3] For example, Caradarella read into evidence a letter he wrote defendant in which he said:

> Inasmuch as the Federal Government seems intent on communicating with you in this area, I think it would be advisable to formally notify them that upon advice of counsel you cannot *provide the information requested* unless and until such time as a guarantee coextensive with your Fifth Amendment right against self-incrimination may be offered to you.
>
> . . . I might suggest as to form the following note to be included with the forms which have been sent to you and returned. 'Upon advice of counsel, I decline to provide the information requested, upon the grounds that to do so might tend to incriminate me.' V R. 520-21 (emphasis added).

Cardarella also testified he could not "recall advising [defendant] with regard to the payment of tax . . . ." V R. 532.

individual engaged in wagering activities must file when he pays $500 tax under 26 U.S.C. § 4411. IV R. 410-411; I Suppl. R. The Government then offered in evidence an IRS Form 3050, a certification of lack of record which, Bradford testified, indicated a search had been made for "the Form 11-C, for the taxpayer Paul Neal, 9616 Northland Road, Oklahoma City, Oklahoma, for the periods January '78 through June of '83."[4] The form indicates . . . there is no record of that form being filed by Mr. Neal" and "no $500 fee paid either." IV R. 410, 411; I Suppl. R.

Bradford then explained general IRS search procedure. In general, local service center personnel go to the IRS computer terminals at the service center and "punch in the request or the requested name, social security number and address, and the form type . . . ." This information is transmitted to the IRS national computer center where a nationwide search is conducted. He testified that the search in this case revealed that Neal had not filed the Form 11-C or paid the $500 tax. IV R. 411-12. However, on cross-examination, Bradford admitted the IRS used Neal's employer identification number and not his social security number to conduct the search. IV R. 420.

Defendant argues that the Form 3050 does not prove beyond a reasonable doubt that Neal did not pay the tax for the years in question. He says the underlying search would have missed any forms 11-C he might have filed because the search request used the 9612 Northland address instead of the address where Neal claims he was living at the time, and because the search request did not include his social security number. Appellant's Brief at 7-9.

---

[4] Although Bradford testified the form indicated a search for Paul Neal at 9616 Northland Road, the form itself shows the search was conducted for Neal at 9612 Northland Road. This is the house at which the evidence establishes Neal kept "a table with a number of telephones on it and pieces of paper." III R. 266. I Suppl. R. Pl. Exh. 15.

The foundation underlying the Form 3050 did have deficiencies. As noted, Bradford admitted using Neal's employer identification number but not his social security number in the search, as is referred to in connection with searches for filing of income tax returns. *See United States* v. *Farris*, 517 F.2d 226, 227 (7th Cir. 1975). However, viewing the record as a whole and drawing all reasonable inferences in favor of the verdict, we hold that the evidence was sufficient to establish that Neal did not pay his wagering stamp tax. Although the Form 3050 is not itself inclusive, it was admitted without objection, IV R. 418, and it does tend to prove Neal did not file the form or pay the tax. Form 11-C "Special Tax Return and Application for Registry-Wagering" does require the entry of the filer's Social Security Number; *and* also his "Employer identification number," or an attached application for such number, or a statement that such a number has been applied for. I Supp. R. Pl. Ex. 16. Thus the Form 3050 certification concerning the absence of computer evidence of Neal's payment of the tax *did* refer to a relevant type of number identification, as well as Neal's name. Furthermore, other evidence, such as Neal's discussion with his attorney, his use of deception in the course of his bookmaking business, and his maintenance of a separate place of business for his wagering activities, lends support to the inference that any failure to file was willful and also to the inference that, in fact, Neal failed to pay the occupational tax at all.

AFFIRMED.

Entered for the Court
William J. Holloway, Jr.
Chief Judge

APPENDIX B

No. 86-1676

MARCH TERM—March 25, 1988

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PAUL E. NEAL,
Defendant-Appellant.

Before Honorable William J. Holloway, Jr., Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges.

The court filed its order and judgment in the captioned case on September 3, 1987, and on January 8, 1988, the court denied appellant's petition for rehearing and suggestion for rehering en banc, and also denied appellant's motion for stay of mandate.

The court now has for consideration appellant's motion to vacate the January 8 order on the ground that appellant's counsel was not notified of the court's action, and appellants' motion to extend his surrender date.

Upon consideration whereof, the court vacates the portion of its January 8 order that denied appellant's petition for rehearing and suggestion for rehearing en banc, but reaffirms its denial of appellant's motion for stay of mandate.

Further the court denies appellant's motion to extend his surrender date.

The court enters a new order on appellant's petition for rehearing and suggestion for rehearing en banc as follows:

The petition for rehearing is denied by the panel that rendered the decision to be reheard.

The petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel or judge in regular active service on the court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker, Clerk
ROBERT L. HOECKER, Clerk

Form **11-C**
(Rev. May 1979)
Department of the Treasury
Internal Revenue Service

Special Tax Return and Application For Registry—Wagering

Return for period from ..... 19 ..... to June 30, 19 .....
(Month, day, and year)

See Instructions on back for time and place for filing return.

Check one: ☐ First return and application ☐ Renewal return and application ☐ Supplemental return and application

1 Name

True name

Alias, style, or trade name, if any

Social security number

Employer identification no. (see instruction 1)

2 Address

Residence: Number and street

City, County, State and ZIP code

Business: Number and street

City, County, State and ZIP code

For Internal Revenue Use Only

Stamp number ►
Date issued ►

T $	1
FF	2
FP	3
I	4
T $	5

3 If this is a supplemental application, please explain and give your Special Tax Stamp Number and employer identification number. (See instruction 2(b).) ►

Compute tax as explained in instruction 4, and enter amount due here . . ► $

Make check or money order payable to the Internal Revenue Service for the amount of tax due and remit with return.

If additional space is required for items 4, 5(a), 5(c), or 6, attach additional sheets, identifying each entry as to item number.

4 If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address	Social security number

5 Are you or will you be engaged in the business of accepting wagers on your own account? . . . . . ☐ Yes ☐ No

If "Yes," complete (a), (b), and (c) of this item.

(a) Name and address where each such business is or will be conducted.

Name of location	Address (Number and street)	City, State, and ZIP code

(b) Number of employees and/or agents engaged in receiving wagers on your behalf ►

(c) True name, special stamp number, address, and social security number of each such person.

True name	Special stamp no.	Address	Social security number

6 Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons? . . ☐ Yes ☐ No

If "Yes," give true name, address, and social security number of each such person.

True name	Address	Social security number

Signature and Verification

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

Signature ► Title (Owner, etc.) ► Date ►

Instructions

(References are to the Internal Revenue Code.)

1. Who Must File.—Every person who is liable for the 2-percent excise tax imposed by section 4401, and every person who is engaged in receiving wagers for or on behalf of any person so liable, subject to a special tax of $500 per year imposed by section 4411, and must file Form 11-C.

In addition, you must file Form 730 each month to pay and report the tax on wagers.

Section 4421 defines the term "wager" to mean (1) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (3) any wager placed in a lottery conducted for profit.

The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include: (A) any game of a type in which usually (i) the wagers are placed, (2) the winners are determined, and (3) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game; and (B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

If you are required to file Form 11-C and have not applied for an employer identification number, please complete Form SS-4, Application for Employer Identification Number, and attach it to your return when you file. If you have applied for a number but have not received notice of it by the time you must file, please write "Number applied for" in the block on the form for the number.

2. When To File.—(a) First and Renewal Returns and Applications for Registry.—Form 11-C serves two purposes: (A) A special tax return and (B) an application for registry. The first return and application for registry must be filed prior to engaging in the activity which results in liability for the special tax on wagering. Renewal returns and applications are required to be filed on or before July 1 of each year thereafter during which taxable activity continues. Changes in ownership which require a return and application for registry, and which result in special tax liability, include the following:

(1) Admission of new members to a firm or partnership.

(2) Formation of a corporation to continue a business of a partnership.

(3) Continuance of the corporate business by a stockholder after the corporation is dissolved.

(b) Supplemental Applications for Registry.—Change of place of business or residence address must be registered by filing a Form 11-C, checking the block designated "Supplemental Return and Application," and stating the new address and the date of change before: (1) you engage in any wagering activity at the new address, or (2) the termination of a 30-day period which begins on the day after the date of such change, whichever occurs first.

Any other change must also be registered within 30 days after such change. Examples of such other changes include the following: (1) Continuance of the operation of a business of a deceased person, who has paid the special tax, by the surviving spouse or child, or executor or administrator, or other legal representative, (2) Continuance of a business by a receiver or trustee in bankruptcy, (3) Continuance of a business by an assignee for the benefit of creditors, (4) Withdrawal from a firm or partnership of one or more members, and (5) Mere change of corporate name. Failure to comply with these requirements will result in additional tax and penalty. The taxpayer's special tax stamp must accompany such supplemental application for proper notation.

Not later than 10 days after engaging a new agent or employee to receive wagers, an individual accepting wagers on his or her own account shall register the name, number appearing on the special tax stamp, address, and social security number of each such agent or employee by filing a Form 11-C designated "Supplemental Return." Likewise, an agent or employee receiving wagers on behalf of another shall register the name, address, and social security number of each additional person by whom he or she is engaged to receive wagers within 10 days after being so engaged.

3(a). Where to File:

If your principal business, office or agency, or legal residence in the case of an individual, is located in ▼	Use this address ▼
New Jersey, New York City and counties of Nassau, Rockland, Suffolk, and Westchester	Internal Revenue Service Center Holtsville, NY 00501
New York (all other counties), Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont	Internal Revenue Service Center Andover, MA 05501
District of Columbia, Delaware, Maryland, Pennsylvania	Internal Revenue Service Center Philadelphia, PA 19255
Alabama, Florida, Georgia, Mississippi, South Carolina	Internal Revenue Service Center Atlanta, GA 31101
Michigan, Ohio	Internal Revenue Service Center Cincinnati, OH 45999
Arkansas, Kansas, Louisiana, New Mexico, Oklahoma, Texas	Internal Revenue Service Center Austin, TX 73301
Alaska, Arizona, Colorado, Idaho, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington, Wyoming	Internal Revenue Service Center Ogden, UT 84201
Illinois, Iowa, Missouri, Wisconsin	Internal Revenue Service Center Kansas City, MO 64999
California, Hawaii	Internal Revenue Service Center Fresno, CA 93888
Indiana, Kentucky, North Carolina, Tennessee, Virginia, West Virginia	Internal Revenue Service Center Memphis, TN 37501

If you have no legal residence, principal place of business or principal office or agency in any Internal Revenue district, file your return with the Internal Revenue Service Center, Philadelphia, Pennsylvania 19255

(b) Hand-carried returns.—Returns which are filed by hand-carrying (as defined in I.R.C. regulations section 301.6091-1(c)) shall be filed with the District Director or with any permanent post of duty within that Internal Revenue district.

4. Computation of the Special Tax on Wagering.—Special tax liability is computed from the first of July of each year, or the first day of the month during which business is commenced, to the thirtieth day of June following. For a renewal or for a business begun during July, the tax is $500.00. Where business is begun after the month of July, the tax to be remitted is computed by multiplying the monthly rate of $41.66⅔ by the number of months remaining in the fiscal year. Example: If a person first commences business in November, liability should be computed as follows: $41.66⅔ x 8 (the number of months remaining in the fiscal year) equals $333.33, the amount to be remitted. Enter the amount of tax in the block on the face of the return.

5. Penalties.—If the return is not filed prior to engagement in the activity which results in liability for the occupational tax on wagering, the penalty prescribed by sections 6651 and 6653 may be incurred. In addition, under the provisions of section 7262, any person who does any act which makes that person liable for the special tax, without having paid such tax, shall be fined not less than $1,000 and not more than $5,000. For willful failure to file a return or pay the tax, the penalties under sections 7201 and 7203 may be imposed. For making and subscribing a false return, statement or other document under the penalties of perjury, or aiding, or advising the preparation of such returns, statements or other documents, the penalties under sections 7206(1) and 7206(2) may be imposed.

Under section 1001 of Title 18, U.S.C., whoever knowingly makes any false or fictitious statement with respect to the payment of the special tax, such as the giving of a false name or address, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

6. Disclosure of Wagering Tax Information.—No Treasury Department official or employee may disclose, except in connection with the administration or enforcement of Internal Revenue taxes, any document or record supplied by a taxpayer in connection with such taxes, or any information obtained through any such documents or records. Additionally, certain documents related to the wagering taxes, and information obtained through such documents, may not be used against the taxpayer in any criminal proceeding, except in connection with the the administration or enforcement of Internal Revenue taxes. See section 4424 for more detailed information.

☆ U.S. GOVERNMENT PRINTING OFFICE 1979—O-233-400

Form 730 (Rev. July 1979) Department of the Treasury Internal Revenue Service

Tax on Wagering

(Section 4401 of the Internal Revenue Code)

1 Gross amount of wagers accepted during month (not including lay-offs accepted) . .	$	
2 Gross amount of lay-off wagers accepted during month (See Instructions)		
3 Add lines 1 and 2		
4 Tax (2 percent of line 3)		
5 Lay-off credits. (No credit allowed unless supported by evidence. See Instructions) .	(—)	
6 Net tax due (subtract line 5 from line 4) .	$	

For month of ....JAN..... 1981...

Employer identification number

For IRS Use Only
T $ .....
FF .....
FP .....
I .....
T $

Your name and address in space below

LN 73-1103735 730 - DO 73 A

PAUL E NEAL
9612 NORTHLAND RD
OKLAHOMA CITY OK 73101

Under the penalties of perjury, I declare that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief it is true, correct, and complete.

Signature ..... Date .....

Title (Owner, etc.) .....

ORIGINAL.—File this return (with your payment) with Internal Revenue Service Center. (See Where to File on back.) Include your employer identification or social security number on your check or money order.

If your business records are not available at the address shown above, enter address where records are maintained.

(Number and street) (City) (State) (ZIP code)

12a

APPENDIX D

QUINN & PEEBLES
Attorneys at Law
Q & P Building
1104 Oak Street
Kansas City, Missouri 64106

February 18, 1981

Paul E. Neal
9612 Northland Road
Oklahoma City, Oklahoma 73101

Dear Mr. Neal:

This is to confirm our conversation with regard to the Form 730 which you have been sent through the mail.

I believe there is a question with regard to whether such a form could be a requirement which is in violation of your Fifth Amendment right against potential self-incrimination. This is particularly true in view of what we have found to be a unreliability of assurances of confidentiality between federal agencies.

Under the circumstances I believe that you should keep track of what information is applicable (assuming that such information is applicable) and after I have had the opportunity to research the law in this matter I will advise you as to whether such forms may, in fact, be required lawfully, and if so, what information you may be required to provide.

I shall likewise, be researching whether you have any other obligations to the Federal Government. After I have had the opportunity to research these points so that I may properly advise you, I shall contact you.

Very truly yours,

/s/ Philip F. Cardarella
PHILIP F. CARDARELLA

APPENDIX E

QUINN, PEEBLES, BEAIRD & CARDARELLA
Attorneys at Law
Q & P Building
1104 Oak Street
Kansas City, Missouri 64106

October 12, 1981

Mr. Paul Neal
9612 Northland Road
Oklahoma City, Oklahoma 73101

Dear Mr. Neal:

This is to confirm our previous conservations. Since I spoke with you developments which have arisen which create a potential conflict of interests in which I feel it necessary to disclose to you.

As you are undoubtedly aware, but as I am, of course, notifying you, this office represents Mr. Tracy Coy Poe in a matter in which you are a co-defendant. While this does not, in any way, alter my opinion previously expressed to you, this is an element which I believe must be specifically understood by you and I think that given those circumstances, it would be advisable for you to discuss the matter in which I advised you, and which I am now providing you with a written memorandum concerning, with your present counsel in the Oklahoma City case.

Having gotten that formality out of the way, I wish to reemphasize that having reviewed the status, it is still my opinion that the "guarantee" of the tax regulation is not coextensive with the Fifth Amendment and provides neither transactional nor use immunity and, therefore, does not overcome the Fifth Amendment privilege against self incrimination.

That is, after all, our major concern in this. Inasmuch as the federal government seems intent on communicating with you in

this area, I think it would be advisable to formally notify them that upon advice of counsel you cannot provide the information requested unless and until such time as a guarantee, co-extensive with your Fifth Amendment right against self-incrimination may be offered to you. I frankly do not know that this must be legislative, it may well be that some officer of the government (for example, an assistant attorney general) could bind the government in such a way as to prevent the use of this. I suggest that you, before you give up your Fifth Amendment right, that you discuss specifically with your present counsel what would be advisable. I might suggest as to form, the following note to be included with forms which have been sent to you and returned

> "Upon advise of counsel I decline to provide the information requested upon the grounds that to do so might tend to incriminate me"

I think it is as simple as that. In the event that the Tenth Circuit, in reviewing the case which is going to it, should rule that these guarantees are co-extensive with the Fifth Amendment, then it might be necessary to review our position. But, at this time I cannot in good conscience advise you that such guarantees are co-extensive with the Fifth Amendment rights.

Again, because of the matters which have arisen since we spoke, I think it is important that you review this with your present counsel. I would be more than happy to discuss the matter with him if he would wish to contact me, and if you would be kind enough to provide me with an authorization to do so.

Very truly yours,

/s/ Philip F. Cardarella
PHILIP F. CARDARELLA

Pro-Law Enforcement Bills Introduced

By Wayne Singleterry
Staff Writer

Local and state law enforcement officials will have a bigger stick to strike down organized crime, drug abuse and possession under new laws proposed Thursday by a coalition of state and federal officials.


Bill Price

State Attorney General Robert Henry and U.S. Attorney Bill Price said at a state Capitol news conference Oklahoma needs more clout to bring criminals to justice, and now seems like a good time to get it.

"We feel the mood in the Legislature is very pro-law enforcement. The time is right to bring some stricter law enforcement packages forward," Henry said.

The changes would give Oklahoma police and investigators the same tough tools federal officials have for nabbing suspected criminals. They were developed by the Law Enforcement Coordinating Committee, a group of police chiefs, district attorneys and other state and federal crime fighters.

Seven separate laws have been proposed. Thursday was the last day new legislation could be introduced this session, and all the proposals have legislative sponsors.

One would broaden the state's ability to use wiretaps to help build cases for prosecution by adding kidnapping, robbery and rape to the list of offenses for which phones may be tapped. The only offenses the state can tap phones for now are murder and drugs, Price said.

Local, county and state officials, with a court order, could also obtain lists of local and long-distance telephone calls placed from a particular phone. That might also convince a judge to issue a wiretap order, Henry and Price said.

If approved, the proposed legislation would also allow hearsay evidence for the first time to be introduced before county and multicounty grand juries and in preliminary hearings.

One proposed new law punishes teen-agers convicted of possession, use or abuse of alcohol or controlled substances. For the first offense they would have to wait an additional year or until they are 17 before they could obtain a driver's license. After a second offense they would have to wait until they are 18. Driver's licenses are normally issued at age 16.

Evidence of a controlled substance in a person's body could result in prosecution for drug possession, which is often a more severe offense than mere consumption.

Real estate would be added to the types of property that could be seized and sold in crackdowns on drug dealers. The burden of proof that cash and other property was obtained through illegal drug sales would also be eased, under one of the proposed changes.

Procedures for setting execution dates and stays for death row inmates would also be streamlined.

APPENDIX G

THE DAILY OKLAHOMAN / Tuesday, March 15, 1988

Anti-racketeering Bill OK'd in House

By Charles T. Jones
Staff Writer

The Oklahoma House of Representatives Monday unanimously approved anti-racketeering legislation which draws much of its power from the highly successful federal Racketeer Influenced and Corrupt Organizations (RICO) Act.

The RICO act has given federal authorities a powerful set of tools, primarily seizure of assets and mandatory, minimum prison terms, to deal with organized criminal activities ranging from securities fraud to drug trafficking.

The federal act also allows plaintiffs in civil actions alleging RICO violations to collect treble damages, if they prove their cases. There is no such provision in the proposed Oklahoma Corrupt Organizations Prevention Act, however. Only the state attorney general and district attorneys could file court actions alleging violations of the state law.

U.S. Attorney Bill Price of Oklahoma City told the House Judiciary Committee last week that adoption of a state anti-racketeering bill would allow Oklahoma authorities to handle local cases that heretofore only federal authorities, with the RICO Act, could effectively prosecute.

The proposed state law, SB 127, was approved in the House by a vote of 95-0 and now returns to the Senate for consideration of House amendments.

The proposal would allow authorities to seize assets of criminals proved to have been involved in a "pattern of racketeering activity."

Federal authorites in Oklahoma, using the RICO Act, have seized airplanes, automobiles, homes, bank accounts and other assets of criminals convicted of engaging in racketeering.

The proposed state law calls for prison terms of not less than 10 years, and those convicted under the state act would not be eligible for deferred or suspended sentences, probation, work furlough, house arrest "or release from confinement on any other basis until the person has served one-half of his or her sentence."

Defendants found to have violated the act would be subject to seizure of "any real or personal property used in the course of, derived from, or realized through conduct in violation" of the act.

Public officials found to have violated the act while in office would have to forfeit "any compensation, right or benefit derived from a position, office, appointment, tenure, commission, or employment contract that accrued to him during the course of conduct."

'Chop Shop' Bill Plans Cut Short

By Charles T. Jones
Staff Writer

A pair of state lawmakers were fed a wedge of humble pie Wednesday when their much-ballyhooed press conference to announce a sweeping anti-"chop shop" and auto-theft program was sandbagged by House leaders.

Guy Davis

Don Duke

A sudden cancellation of the news conference left the U.S. attorney and representatives of the FBI, state Department of Public Safety, Oklahoma State Bureau of Investigation, various other law enforcement officials and prosecutors, and most of the Capitol press corps bewildered.

"I was surprised, shocked and disappointed," freshman Rep. Vickie White, D-Norman, told *The Oklahoman* later Wednesday.

"I still don't fully

See HOUSE, Page 2

House

From Page 1

understand what happened to me today."

White's bills, in part, would have set up a mechanism for licensing and unannounced inspection of auto-salvage operations and separately colored vehicle title registration papers for salvaged autos.

A news conference, scheduled and canceled twice previously this week, was set again for 10 a.m. Wednesday, to be hosted by White and veteran Rep. Don Duke, D-Ardmore.

State and federal law enforcement officials and reporters gathered in Duke's office for the expected announcement.

But at 10 a.m., House Majority Leader Guy Davis, D-Calera, swept into the room and ushered Duke into Duke's own office.

Duke and Davis remained sequestered for almost an hour before Duke suddenly emerged, obviously embarrassed, and announced the news conference was canceled. He offered no explanation.

U.S. Attorney Bill Price and his law enforcement colleagues, taken aback by the unexplained cancellation, set up their own press conference in another room. There, they extolled the virtues of White's proposed legislative program.

However, no one knew what fate awaited the proposed legislation.

White's key bill, the proposed "Motor Vehicle Chop Shop, Stolen and Altered Property Act," was triple-assigned by House leaders later Wednesday to the House Judicial, Revenue and Taxation, and Public Safety committees. Such unusual tactics usually are implemented to stall a bill in the legislative process.

Duke, asked to explain the situation, told *The Oklahoman*, "Well, I don't know for sure yet. There's just some problems that I think one day next week we'll have them all worked out."

Duke later said, "I'm really not at liberty ... if I ... I don't mean to be evasive with you, but this is one time when I've got to or I'll screw up the deal ... I really can't. I'm sorry."

(2)

No. 87-2130

In the Supreme Court of the United States

OCTOBER TERM, 1988

PAUL NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the recordkeeping requirements and disclosure provisions of the wagering tax laws, 26 U.S.C. 4401 *et seq.*, violate the Fifth Amendment privilege against compulsory self-incrimination.

2. Whether the evidence was sufficient to support petitioner's convictions for willful failure to pay the special occupational tax imposed by 26 U.S.C. 4411 on persons engaged in the business of receiving wagers, in violation of 26 U.S.C. 7203.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2130

PAUL NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1987. A petition for rehearing was denied on March 25, 1988 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on May 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on four counts of willfully failing to pay the $500 yearly occupational tax imposed by 26 U.S.C. 4411 on persons receiving wagers, in violation of 26 U.S.C. 7203.

Petitioner was sentenced to concurrent terms of one year in prison on each count, fined $5,000 on each count, and ordered to pay $3,251.59 as the costs of the prosecution. The court of appeals affirmed (Pet. App. 1a-7a).

1. The evidence at trial showed that petitioner was engaged in the business of accepting wagers on football, basketball, and baseball games from September 1978 through June 30, 1982. Using the alias "Fred," petitioner ran a bookmaking operation from a location outside his home; that location was equipped with a bank of telephones and betting pads. Petitioner "gave no receipts and operated on a cash basis" (Pet. App. 4a). In addition, petitioner used code numbers to identify his bettors and kept his records in code (*id.* at 3a-4a).

The evidence also showed that petitioner failed to file Internal Revenue Service Form 11-C (Pet. App. 10a-11a) and pay the $500 yearly occupational tax imposed by 26 U.S.C. 4411 for the calendar years 1978, 1979, 1980, and 1981. During that period, petitioner also failed to file Form 730 (Pet. App. 12a), the monthly return that must be filed to pay the two percent excise tax imposed by 26 U.S.C. 4401(a)(2). Pet. App. 5a-7a.

2. On appeal, the court of appeals first rejected petitioner's contention that the evidence failed to establish that he acted willfully when he failed to pay the tax. The court of appeals held that the jury could infer from the evidence that petitioner knew about the requirement to pay the occupational tax and that his failure to do so was intentional (Pet. App. at 4a). The court also rejected petitioner's claim that the government's evidence of nonpayment was so deficient that the record was insufficient to support a finding that petitioner had not paid the tax (*id.* at 7a).

ARGUMENT

1. Petitioner contends (Pet. 7-8, 11-14) that the recordkeeping and disclosure provisions of the wagering tax laws, 26 U.S.C. 4401 *et seq.*, violated his Fifth Amendment privilege against compulsory self-incrimination, because Oklahoma state law prohibits commercial gambling. Petitioner did not raise that argument before either the district court or the court of appeals, and he has therefore not preserved the issue for review. *E.g., United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, petitioner was neither charged with nor convicted of failing to provide the information required to register under Section 4412; he was charged with and convicted of willfully failing to pay the yearly occupational tax imposed by Section 4411, in violation of Section 7203. Thus, petitioner has no basis for raising this constitutional argument on a challenge to his conviction under Section 4411.[1] In any event, even assuming that petitioner may assert the claim, it fails on the merits.

The wagering tax provisions of the Internal Revenue Code impose certain tax obligations and recordkeeping requirements on persons who are "engaged in the business of accepting wagers" (26 U.S.C. 4401(c)). Section 4411 im-

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[1] Petitioner asserts (Pet. 7) that any effort to pay the occupational tax without also filing Forms 11-C and 730 would have been futile. For that reason, he suggests, he is entitled to raise his objection to providing the information sought by those forms, even though he was not prosecuted for failing to file the forms or for failing to provide the information required by the forms. Even if his assertion regarding the IRS practice is correct, petitioner has cited no authority to suggest that he could be prosecuted for failing to pay the occupational tax if he tendered payment of the tax without filing the forms or providing the information on the forms that, according to him, poses a risk of self-incrimination.

poses a "special tax of $500 per year [on all persons] engaged in receiving wagers." Section 4412 requires any such person to register with the district Internal Revenue Service (IRS) director and disclose, among other things, his name, residence, employees' names, and all addresses where he conducts his wagering business. When a bookmaker registers and pays the occupational tax, the IRS issues him a special stamp. In addition, Section 4403 requires each bookmaker to "keep a daily record showing the gross amount of all wagers on which he is so liable."

In addition, the wagering tax provisions contain specific restrictions on the disclosure and use of wagering tax information. The disclosure provision, Section 4424, makes clear that officials and employees of the Treasury Department may not "divulge or make known in any manner whatever to any person" any document, record, or other information supplied by the taxpayer in connection with the wagering tax laws. Such disclosure is permitted only "in connection with the administration or civil or criminal enforcement of any tax imposed by [the Internal Revenue Code]" (26 U.S.C. 4424(b)); information that is disclosed may be used only "in connection with the administrative or civil or criminal enforcement of [the Internal Revenue Code]" (26 U.S.C. 4424(b)(1)); see 26 U.S.C. 4424(c).[2] Contrary to petitioner's claim, the courts of appeals have unanimously held that this statutory scheme, which severely restricts the government's use and disclosure of

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[2] Disclosure of wagering tax information also falls within the Internal Revenue Code's general provision governing disclosure of income tax return information. See 26 U.S.C. 6103(*o*)(2). Accordingly, any unauthorized disclosure of information under Section 4424 is a felony punishable by a maximum of five years' imprisonment, a $5,000 fine, and the costs of the prosecution. See 26 U.S.C. (& Supp. IV) 7213. If the offender is a federal official, he faces the additional penalty of losing his position. See 26 U.S.C. 7213(a)(1). See also 18 U.S.C. 1905.

information submitted by the taxpayer in compliance with the wagering tax laws, is consistent with the Fifth Amendment. *E.g., United States* v. *Appoloney*, 761 F.2d 520, 523 (9th Cir.), cert. denied, 474 U.S. 949 (1985); *United States* v. *Merlo*, 704 F.2d 331, 332 (6th Cir. 1983); *United States* v. *Jeffers*, 621 F.2d 221, 223-226 (5th Cir. 1980); *United States* v. *Stavros*, 597 F.2d 108, 114 (7th Cir. 1979); *United States* v. *Sahadi*, 555 F.2d 23, 24-27 (2d Cir. 1977). See also *United States* v. *Freed*, 401 U.S. 601, 606 (1971) (restrictions on disclosure of firearm registration information to state and local law enforcement officials undermines defendant's claim that registration creates "substantial" and "real" risks of self-incrimination).

Petitioner's reliance (Pet. 8) on *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), is misplaced. In those cases, the Court held that the wagering tax provisions in force at the time violated the Fifth Amendment, because "the obligations to register and to pay the occupational tax created for [the taxpayer] 'real and appreciable' * * * hazards of self-incrimination" (390 U.S. at 48; see *id.* at 66-67). The Court found that the statute created such "hazards" in several respects. First, 26 U.S.C. (1964 ed.) 6806(c) required a registering bookmaker to display his special tax stamp "conspicuously" in his place of business; if he had no place of business, the bookmaker had to carry the stamp with him and show it upon demand to any Treasury officer. Second, 26 U.S.C. (1964 ed.) 6107 required the district IRS office "to maintain for public inspection a listing of all who have paid the occupational tax, and to provide certified copies of the listing upon request to any state or local prosecuting officer" (390 U.S. at 43). Third, the IRS followed a policy of " 'mak[ing] available' to law enforcement agencies the names and addresses of those who have paid the wagering taxes" (*id.* at 48).

In response to *Marchetti* and *Grosso,* Congress substantially amended the wagering tax laws in order to eliminate the hazards of compulsory self-incrimination. Congress eliminated the requirement in Section 6806(c) that bookmakers display their stamps or produce them upon demand to Treasury officials. Congress also repealed Section 6107 so that local IRS offices would no longer provide wagering tax information to local law enforcement agencies. Finally, as pointed out above, Congress enacted Section 4424, with its specific restrictions upon the disclosure and use of wagering tax information, as part of an effort to "resolve any remaining doubts which may exist under the rationale of the *Marchetti* * * * and *Grosso* * * * cases" (H.R. Conf. Rep. 93-1401, 93d Cong., 2d Sess. 5 (1974)). Thus, as the courts of appeals have uniformly concluded in the cases cited above, the current wagering tax provisions do not violate the Fifth Amendment as interpreted in this Court's decisions in *Marchetti* and *Grosso.*[3]

2. Petitioner also renews his contention (Pet. 8-11) that the evidence did not show that he willfully failed to

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[3] Petitioner asserts that the IRS "may not disclose information on wagering tax returns to other law enforcement agencies" (Pet. 12), and that the disclosure made in this case was therefore both improper and an indication that the risk of improper disclosure in general is substantial. Petitioner's premise is wrong. Under Section 4424(b), the IRS may disclose such information to the Department of Justice when, as in this case, the disclosure is made "in connection with the * * * criminal enforcement of [the Internal Revenue Code]". Moreover, contrary to petitioner's statement (Pet. 12), Section 4424(b) unequivocally prohibits disclosure to state law enforcement authorities, because such disclosure would not be "in connection with the administration or civil or criminal enforcement of [the Internal Revenue Code]"; see note 2, *supra*. Finally, petitioner's claim that wagering tax information may be " 'leaked' " to state officials is "too speculative" to constitute a real risk of self-incrimination. *United States* v. *Jeffers*, 621 F.2d 221, 226 (5th Cir. 1980).

provide tax information in violation of 26 U.S.C. 7203. There are several answers to that claim. First, petitioner was charged with and convicted of willfully failing to pay the yearly occupational tax imposed by Section 4411, in violation of Section 7203; petitioner was neither charged with nor convicted of willfully failing to provide the information required to register under Section 4412. Second, the evidence showed that petitioner was aware of his legal duty to pay the tax because the IRS had given him the necessary forms and petitioner himself had spoken with an attorney about ways to avoid providing the IRS with the information required when remitting the tax (Pet. App. 4a-5a). Third, the evidence also showed that it was common knowledge among bookmakers in the area that they must pay the special occupational tax in order to obtain the tax stamp (Tr. 332, 334-335). The court of appeals thus correctly held that the "evidence as a whole" supported the jury's verdict that petitioner "knew about the stamp tax and conducted his business the way he did to hide his activities from the IRS and avoid paying the tax" (Pet. App. 4a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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